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No. 84-142

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UNITED STATES CURRENCY AMOUNTING TO THE
SUM OF TWO HUNDRED FIFTY THOUSAND
DOLLARS [\$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF

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September 18, 1984

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Colombia's certiorari petition is not moot, as suggested in Fonseca's September 11, 1984, Memorandum. *Levinson v. United States et al.*, 258 U.S. 198 (1922), disposed of that contention on

similar facts. Nor is the petition, as claimed in Fonseca's Memorandum of August 27th, "premature" by reason of Colombia's motion (denied on September 7th) to intervene in Fonseca's mandamus action, which action is not before this Court.

There was more that occurred in the District Court on September 7th besides the delivery of funds to Fonseca described in his September 11 memo. In addition, the Court not only denied Colombia's motion to intervene but also denied its motion to stay enforcement of the July 31st judgment dismissing the Government's interpleader action, which is before this Court.

Rather than awaiting entry of a judgment in the mandamus action compelling delivery of the funds to Fonseca, which was all that was required of the U.S. Attorney by the Second Circuit's direction to "reinstate Fonseca's complaint" and "for further proceedings consistent with this opinion", Petition at A-3, A-11, the U.S. Attorney on September 7th signed a stipulation calling for immediate delivery of the \$250,000 to Fonseca counsel. The stipulation was immediately signed by Judge Costantino on September 7th.

Had a judgment been entered, the ten-day waiting period for enforcement provided by Fed. R. Civ. P. Rule 62(a) could have given Colombia more opportunity to seek a stay for the second time from the Second Circuit or for the first time from the Supreme Court. The choice of a stipulation instead of a judgment deprived Colombia of this opportunity. At the same time, any such stay was far from assured, as shown by Justice Marshall's denial of Colombia's September 7th stay application.

The U.S. Attorney's haste to accommodate Fonseca counsel contrasts sharply with the Solicitor General's caution shown by his letter of August 31, requesting additional time to respond and including the following paragraph:

Because the Government is merely a stakeholder in this action, whose interests are only indirectly implicated by the certiorari petition, the Government

may ultimately waive its right to respond. Portions of the certiorari petition, however, raise questions of international law requiring further study. The additional time is needed to complete our study of these questions and to prepare a response if it appears that the submission of our views is warranted.

The thirty days requested by the Solicitor General to study "questions of international law" raised by Colombia's certiorari petition were granted, to and including October 1, 1984. The Solicitor General has ample interest, beyond that of a mere stakeholder, in clarifying not only the international law issues but also the questions of when the United States may properly use interpleader and when any party may properly ignore court-ordered discovery as Fonseca repeatedly did.

The U.S. Attorney's haste may perhaps be understood in light of Fonseca counsel's August 29 Motion for Attorneys Fees and Expenses "in an amount not less than \$25,000.00." The motion, returnable September 28th, was against both the U.S. Government and Colombia, relying as to the former on 28 U.S.C. § 2412. Portions of the supporting Declaration follow:

4. In addition, a Stipulation is presently being negotiated between Fonseca and the government to provide for the return of Fonseca's funds to him. Should said Stipulation be executed and "So Ordered", Fonseca may voluntarily withdraw the portion of his motion herein which seeks attorneys' fees and costs from the government.

* * *

6. The bad faith and oppressive conduct of the government herein is set forth by the United States Court of Appeals for the Second Circuit in its opinion in this matter, dated May 17, 1984, which specifically

held that the government's conduct in this case was "wholly unjustified" having "initiated its interpleader action on a wrong legal premise" and having "wrongly instituted it against a legitimate claimant." Slip. Op. 3751, at 3763.

Paragraph 4 thus explicitly proposes to drop the fee demand as to the Government if a stipulation giving Fonseca the funds is signed. The stipulation approved by Judge Costantino on September 7th did call for dismissal of Fonseca's mandamus action "without costs or attorneys fees" and released all other related claims against the United States and its agents.

Whatever its cause, the hasty delivery of funds to Fonseca counsel, by stipulation instead of after judgment, ended Fonseca's mandamus action but in no way affected Colombia's certiorari petition asking for review in the interpleader action. In *Levinson v. United Staes et al.*, *supra*, the Government had similarly used interpleader to settle competing claims to property but turned the property over to one claimant after the Court of Appeals held in that claimant's favor. The Supreme Court rejected a suggestion that the other claimant's appeal was so easily mooted. The delivery, said Justice Holmes, "was a further departure from the position of stakeholder assumed by the United States but it cannot affect the decree to be entered upon its [interpleader] bill." 258 U.S. at 202.

The atmosphere has changed now that Fonseca counsel have received the \$250,000 in U.S. currency which their pleadings say Fonseca smuggled out of Colombia without the Banco de la Republica permit required by that country's exchange control laws. No longer can counsel complain that the U.S. Government, by using interpleader, is oppressively withholding possession. But now the claims of Colombia must be considered, (a) for \$250,000 in U.S. currency (in return for the equivalent in pesos) to add to its foreign exchange reserves, or at least (b) for reversal of the Second Circuit's decision enabling Fonseca's violation of Colombia's exchange control laws to succeed.

If Fonseca has by now conveniently (for him) dissipated the smuggled bills, other bills will suffice for either purpose. At the

same time, this Court should also reverse the Second Circuit's holding that the U.S. Attorney misbehaved in using interpleader and its holding that a party can disobey court-ordered discovery with impunity.

CONCLUSION

The writ of certiorari should issue to review the decision of the Second Circuit dismissing the U.S. Government's interpleader and excluding the Republic of Colombia from the Courts of the United States.

Respectfully submitted,

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September 18, 1984